No. 12,099

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE H. GRAHAM,
Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILROAD (a corporation),
Appellee.

BRIEF FOR APPELLANT.

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I. NATURE AND JURISDICTION OF APPEAL.

This is an action arising under the Federal Employers' Liability Act (Title 45 § 51 U.S.C.A.) for damages for personal injuries alleged to have been sustained by appellant while performing his duties as a brakeman in the employ of defendant railroad. Plaintiff is a citizen of the State of California. Defendant corporation is a citizen of the State of Kansas. Plaintiff has appealed from a directed verdict and the District Court's order denying appellant's motion for new trial. The jurisdiction of the Circuit Court to hear this appeal rests upon 28 U.S.C. 225 and 230. The case was tried in the District Court,

Judge Louis E. Goodman sitting with a jury, on August 17, 18 and 19, 1948. The Court instructed the jury to return a verdict in favor of the defendant Santa Fe Railroad. The jury did so. On August 21, 1948, judgment on the directed verdict was entered of record in favor of defendant Santa Fe Railroad. A motion for new trial was filed on August 25, 1948. That motion was denied on September 20, 1948.

The filing of the motion for new trial suspended the running of the time to appeal from the judgment until its determination. (*Reliance v. Burgess,* 112 F. (2d) 234, 240; Rule 73(a) FRCP, as amended.)

Appellant's notice of appeal was filed on October 16, 1948. The transcript was filed on October 29, 1948.

II. QUESTIONS PRESENTED.

A. Where the evidence in an action under the Federal Employers' Liability Act is such that the only inferences which can properly be drawn therefrom require a verdict in favor of the injured employee, should the Appellate Court direct the trial Court to retry the entire case or to merely submit to the jury the issue of the extent of plaintiff's damage?

B. Was the District Court entitled to hold, as a matter of law, that a general release constituted a complete defense to an action for personal injury

under the Federal Employers' Liability Act, where there is substantial evidence to support inferences of:

1. Fraud in obtaining the release;
2. Mutual mistake of fact; and
3. Plaintiff's lack of knowledge, when he executed the release, of the true nature, extent and permanency of his injury?

III. STATEMENT OF FACTS.

The facts are uncontradicted. Defendant rested its case after producing only the medical testimony of one witness (221)[1] and moved for a directed verdict (263).

The evidence shows that plaintiff started to work for defendant in 1943 (70). At the time of the accident he was employed as a brakeman and defendant was engaged in interstate commerce (26). Plaintiff was under no physical disability and was able to perform the duties of his work (86-87).

On July 5, 1945 plaintiff was working as a flagman (brakeman) (26; 86). He started to work at 11 a.m. at Seligman, Nevada, on a freight train en route to Needles, California (26). The train arrived in the Needles freight yard at 1 a.m. on July 6, 1945, and stopped on track 20 clear of the main line (28). Plaintiff's duty was to stay with the caboose (30).

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[1]Unidentified arabic numerals in parenthesis refer to the pages of the record.

Having cleared the main line (28), plaintiff took down the yellow markers (lanterns) from the rear end of the caboose (30-32) pursuant to company rule No. 19A (31). He then crawled up into the cupola of the caboose, which had observation windows, and sat down while waiting for his train to move further on into the freight yard (32-33). While sitting there, he noticed the reflection of the headlight of an approaching train about 1000 feet to the rear. He turned and watched it and saw it was coming fast. He then leaned out of the cupola window and signaled it to stop with his lantern, but got no response (34-35). Plaintiff then got down from the cupola and went to the rear platform and signaled again. He saw that he had no time to break a fussee as the approaching train was too close.

On one side of the caboose was a river, and on the other side piles of ties. Plaintiff therefore decided to return to the cupola (35). While getting back to his position in the cupola an impact occurred and plaintiff was pitched into the air and down upon the floor of the caboose, approximately six feet below (36), falling upon his back, hips, head and left shoulder (37). Plaintiff was in the act of getting to his feet when a second impact occurred as the engineer of the other train reversed his engine and jerked away from the caboose, thereby causing its rear end to fall to the tracks (37-38). As a result, plaintiff was again thrown to the floor on his back (38).

The first impact pushed the caboose up and into a refrigerator car of bananas (39). The second impact caused the floor of the caboose to fall to the tracks, so that plaintiff fell and was caused to slide out the rear door of the caboose (39).

Plaintiff crawled into a passenger train and was taken into the station. Someone drove him to his cottage in Needles (42). He then painfully drove his car to his home at Searchlight, Nevada (110; 243).

About three weeks later plaintiff was driven to Needles to see a company doctor, who gave him pills to relieve his pain (44).

In early August, plaintiff returned to Needles and saw Dr. Holz, another company doctor, who told him to enter the Santa Fe Hospital at Los Angeles. At that time, plaintiff was suffering pain, mostly in his hip, back, left shoulder and head (45).

On August 10, 1945 plaintiff went to Los Angeles and on August 14, 1945 was admitted to the Santa Fe Hospital (46). X-rays were taken of his injuries and he left the hospital on August 24, 1945 (46). These x-rays revealed plaintiff to have a crushed intervertebral disc between the 5th lumbar and sacrum (223-225; 233-234).

Plaintiff did not see those x-rays and did not know what they revealed (49).

While in the hospital plaintiff was approached by a Mr. Sims of the defendant's claim department in Los Angeles regarding settlement of his case (132).

Upon leaving the hospital, plaintiff refused to settle with the defendant (131-132).

On September 19, 1945, plaintiff discussed his condition with Dr. C. A. Morrison, chief surgeon of the Santa Fe Hospital. Dr. Morrison told him to "go back to work on a passenger job, take it easy and you'll be all right within 30-60 days", and released him (47). The release was unqualified (Pl. Ex. No. 1). At this time, plaintiff did not know he had injuries other than those discussed with Dr. Morrison (49-50).

Plaintiff returned to Needles and discussed settlement with a Mr. Lewis of defendant's claim department. He was told to go to the Los Angeles claim office for this purpose (132). He did so and on October 1, 1945, signed a release (Def. Ex. G) and received a check (Def. Ex. H) in the amount of $1,050. At the time of signing this release, plaintiff did not know he had suffered a permanent disability (57; 61-62).

Plaintiff attempted to return to work as advised by Dr. Morrison. He worked for a period of 45 days with difficulty and pain and was unable to do his regular work (59). Subsequently, he was discharged by defendant (63). He was unable to work thereafter, not being able to work a full day (63).

On February 13, 1946 plaintiff's spine was x-rayed by Dr. Fenlon (59). These x-rays showed the same injury revealed in the x-rays taken at the Santa Fe Hospital in August of 1945 (170; 233-235). Dr. Fen-

lon advised him that he had an injury to his spine (61). This was the first plaintiff knew of this spinal injury. He did not know of it at the time he signed the release on October 1, 1945 (57; 61-62).

Plaintiff filed his complaint herein on August 30, 1946 (2), being then represented by Messrs. Brown and Perlis. The defendant answered (8) on September 25, 1946, and set up as a bar to plaintiff's action the release (8) executed on October 1, 1945. On February 28, 1947, Emmet R. Burns, Esq., replaced Messrs. Brown and Perlis as plaintiff's attorney (9). On November 24, 1947 plaintiff's present counsel were substituted for Mr. Burns as attorneys of record for plaintiff (10).

On November 25, 1947, plaintiff's counsel, on behalf of plaintiff, wrote to defendant's attorneys in Los Angeles, California, enclosing a notice of rescission of release and offer to restore consideration executed by plaintiff (Pl. Ex. No. 5) (262). Defendant's counsel stipulated that the notice and offer to restore were received by defendant's attorneys (261). The offer to restore the consideration received from defendant by plaintiff was made in good faith (79) and with the ability to repay (79; 241-242.)

IV. SPECIFICATION OF ERRORS.

A. That the evidence adduced at the trial establishes, as a matter of law:

1. The liability of defendant; and

2. That the release, pleaded in defendant's answer, is invalid.

B. That the District Court erred in directing a verdict in favor of defendant.

C. That the District Court erred in holding that the release signed by plaintiff was, as a matter of law, a bar to this action. The evidence presented the following questions of fact relative to the purported release, each of which should properly have been determined by the jury:

1. The nature, extent, exacerbation and permanency of appellant's injury;

2. Whether appellant knew or suspected the nature, extent, exacerbation or permanency of his injury;

3. Whether the acts of the defendant railroad in dealing with appellant constituted fraud;

4. Whether, under the evidence, there was a mutual mistake of a material fact at the time of execution of the release;

5. Whether appellant had effectively rescinded the release; and

6. The validity of the release upon any one or more of the foregoing points one to five.

V. LIABILITY OF DEFENDANT ESTABLISHED AS A MATTER OF LAW.

Plaintiff put in his case and defendant adduced only the testimony of one medical witness (221) and moved for a directed verdict (263).

The evidence shows conclusively that plaintiff suffered an injury to his spine as a result of the collision between defendant's engine and the standing caboose in which plaintiff was working (35, 36, 37, 38).

The evidence shows negligence on the part of defendant as a matter of law (35, 36, 37, 38). Defendant was engaged in interstate commerce and plaintiff was acting within the course of his employment (26) at the time of the accident.

There is no evidence of contributory negligence.

The evidence shows that prior to the accident plaintiff had worked for defendant for a considerable period of time as a brakeman (70); that he was under no physical disability in performing his duties as such (86-87); that he, without knowledge thereof, had a degenerative disc between the 5th lumbar vertebra and the sacrum of his spine which, however, caused him no discomfort or disability (86-87; 223-225; 233-234).

The medical evidence—both plaintiff's and defendant's—shows that plaintiff's preexisting disc condition was exacerbated (223; 232-233); that the disc was crushed and rendered into a permanently disabling condition as a result of the trauma of the

accident (232-233). This was the proximate result of defendant's negligence.

Therefore, the issue of liability should be determined by this Court, as a matter of law, since there is no conflict in the evidence and the only reasonable inference which can be drawn is that defendant's liability has been established.

A. The release pleaded in defendant's answer is invalid as a matter of law.

The evidence shows, without conflict, that at the time plaintiff signed the release, he did not know that he was suffering from a crushed vertebral disc, or any disc, which would cause him to be disabled (57; 61-62); that when signing the release, he relied upon the statement of Dr. C. A. Morrison, chief surgeon of the Santa Fe Hospital at Los Angeles, California (who represented that plaintiff "could return to work on passenger service" and "would be all right within 30 to 60 days") (47-49), for the determination of the nature and extent of his injury suffered as a result of the accident (61-62).

The evidence is without conflict that *either:*

1. The defendant was ignorant, at the time the release was executed, of the permanent and serious nature of the injury to plaintiff; or,

2. If the true nature of the injury was known to defendant, then it was guilty of fraud.

Since there is no conflict in the evidence on these points, it follows that, as a matter of law, the release is invalid, whether under the theory of

1. Fraud;

2. Mistake; or

3. That California Civil Code § 1542 applies with regard to the unknown injury suffered by plaintiff.

B. Rescission was effected as a matter of law.

Where a release has been signed as a result of fraud, rescission and return of consideration are unnecessary.

Where Section 1542 of the California Civil Code applies with regard to an unknown injury, in the execution of a release, rescission and return of consideration are unnecessary.

Backus v. Sessions, 17 Cal. (2d) 380; 110 Pac. (2d) 51;

O'Meara v. Haiden, 204 Cal. 354; 268 Pac. 334;

Meyer v. Haas, 125 Cal. 560; 58 Pac. 133;

Matthews v. A. T. & S. F. R. Co., 54 Cal. App. (2d) 549; 129 Pac. (2d) 435.

Where, in the execution of a release, a mutual mistake of fact exists (constructive fraud), a rescission of the release is generally necessary to invalidate or avoid it.

Pac. Greyhound Lines v. Zane (C.C.A.-9th), 160 F. (2d) 736.

In the present case, the uncontradicted evidence discloses that the release was obtained by fraud—therefore rescission and tender of consideration to defendant were unnecessary. The uncontradicted evi-

dence likewise, discloses that plaintiff did not know he suffered from a crushed vertebral disc at the time he signed the release and the case therefore falls within the provisions of Section 1542 of the California Civil Code. Accordingly, no rescission or tender to defendant was necessary.

In any event *assuming* there was merely a mutual mistake of fact, the uncontradicted evidence discloses an effective rescission of the release by plaintiff.

The essential elements of rescission are set forth in Section 1690 of the Civil Code of California, to-wit:

> "Rescission * * *, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:
>
> 1. He must rescind promptly, upon discovering the facts which entitled him to rescind * * * *and is aware of his right to rescind; and*
>
> 2. He must restore to the other party everything of value which he has received from him under the contract; *or must offer to restore the same, upon condition that such party shall do likewise,* unless the latter is unable or positively refuses to do so." (Emphasis added.)

Here, the evidence shows that plaintiff discovered the nature of his *real* injury on February 13, 1946 from Dr. Fenlon's X-rays (59-61); that the plaintiff's complaint was filed on August 30, 1946 (2); that the answer was filed on September 25, 1946 (8); *that plaintiff was not aware that the facts gave him a right to rescind the release until so informed by his present*

counsel on November 8, 1947; that on November 28, 1947, plaintiff mailed to defendant a written rescission and offer to restore the consideration upon condition that defendant return to him the signed release (262); that said offer was received and not acted upon (261); that plaintiff offered to restore the consideration in good faith and had the ability to do so, plus the credit of his attorneys to advance said sum if necessary (79; 241).

The defendant offered no evidence to prove *damage or prejudice* as a result of the time which elapsed between the release and rescission and, as a matter of law, plaintiff, under these facts, was not guilty of laches in rescinding after commencement of the action.

Robert Hind v. Silva (1935, C.C.A. 9th), 75 F. (2d) 549;

Carr v. Sacto Clay Prod. Co., 35 Cal. App. 439; 170 Pac. 446;

Hannan v. Steinman, 159 Cal. 142; 112 Pac. 1094;

Doak v. Bruson, 152 Cal. 17; 91 Pac. 1001;

Allen v. Chatfield, 172 Cal. 60; 156 Pac. 1001;

Hassom v. City of Long Beach, 83 Cal. App. (2d) 745; 189 Pac. (2d) 787;

Matthews v. A. T. & S. F. R. Co., 54 Cal. App. (2d) 549; 129 Pac. (2d) 435;

O'Meara v. Haiden, 204 Cal. 354, 268 Pac. 334;

Security Trust & Savings Bank v. Railroad, 214 Cal. 81, 88; 3 Pac. (2d) 1015;

Newport v. Halton, 195 Cal. 132, 231 Pac. 987; *Simmons v. Briggs,* 69 Cal. App. 447; 231 Pac. 604.

Consequently, plaintiff did, as a matter of law, effectively rescind the release.

Therefore, the issue of validity of the release, whether upon the theory of fraud, mistake, or the rule of Civil Code § 1542, should be determined by this Court, as a matter of law, since there is no conflict in the evidence and the only reasonable inference which can be drawn is that the evidence has established it to be invalid.

Therefore, since, as a matter of law, defendant's liability to plaintiff is established and the pleaded release is invalid, this Court should instruct the District Court to order a new trial of the single issue of the extent of plaintiff's damage and enter judgment for plaintiff in that sum.

VI. GROUNDS REQUIRING REVERSAL OF JUDGMENT.

A. As pointed out above, it is plaintiff's position herein that the uncontradicted evidence adduced at the trial establishes as a matter of law:

1. Defendant's liability; and

2. That the release pleaded in defendant's answer is invalid.

B. Even if the foregoing ground were not well taken, the evidence *at least* presented the following

questions of fact, each separately treated hereafter, which should have been submitted to the jury:

1. The nature, extent and permanency of plaintiff's injury.

2. Whether plaintiff entered into the release under a mistaken belief as to the real nature of his injury.

3. Whether Civil Code Section 1542 applies, i.e., whether plaintiff "knew or suspected" he had a permanent injury.

4. Whether defendant, under the circumstances, was guilty of fraud.

5. Whether there was a mutual mistake of fact.

6. Whether plaintiff effectively rescinded the release.

7. Whether, under the circumstances, the release was valid.

C. The directed verdict was contrary to law.

"It is well settled that where a motion for nonsuit is made, all evidence favorable to plaintiff's case must be accepted as true; that all reasonable inferences from the evidence must be drawn in favor of plaintiff; that it is error to grant the motion where there is any substantial evidence or reasonable inferences to be drawn from it which would support a judgment for plaintiff."

Engstrom v. Auburn Auto Sales Corp., 11 Cal. (2d) 64, 66, 77 Pac. (2d) 1059;

Locke v. Meline, 8 Cal. App. (2d) 482-484, 48 Pac. (2d) 176 and cases cited therein.

It is settled that the same rules apply to a motion for directed verdict as to a motion for nonsuit.

Maestro v. Kennedy, 57 Cal. App. (2d) 499.

In the present case, there is not even a conflict in the evidence.

Under the Federal Employers' Liability Act, where a jury trial is demanded, the District Court *must* submit issues to the jury if the evidence *might* justify a finding either way on such issues. And a directed verdict should not be given where the evidence is such that fairminded men may draw different inferences. (*Wilkerson v. McCarthy,* 69 Sup. Ct. 413, 414, 417, 335 U.S. 807.)

Referring to *Callen v. Penn Ry. Co.,* 68 Sup. Ct. 296, 332 U.S. 625; 92 L. Ed. 235, the Circuit Court of Appeals (8th) in *Henwood v. Coburn,* 165 Fed. (2d) 418 at page 425 stated:

> "* * * under the teaching of the recent decisions of the Supreme Court, the domain of the jury in circumstantial cases under the Federal Employers' Liability Act *may not be narrowly bounded,* and the settling of any question of negligence or proximate cause, where more than one rational possibility is involved on the evidentiary facts, is *exclusively* within its field. This is true for every purpose in the case, and, in according the jury its inherent function, recognition of the right in one aspect or incident of

a case is as important as in another." (Emphasis added.)

D. Questions of Fact Raised by the Evidence.

1. The question of the nature, extent and permanency of plaintiff's injury should have been submitted to the jury.

The nature, extent and permanency of injury are questions of fact to be determined by the trier of fact—whether Court or jury. (*Callen v. Penn Ry. Co.,* 63 Sup. Ct. 296, 332 U.S. 625; 92 L. Ed. 235.)

The fact of plaintiff's injury is uncontradicted. The medical testimony of defendant's only witness corroborates and establishes the following facts:

a. That plaintiff's preexisting degenerative disc was non-disabling (233);

b. That as a result of his injury, this condition was caused to flare up and become exacerbated, and disabling (232-233);

c. That this is a permanent condition and that plaintiff cannot perform his manual labor in the future (236); and

d. That the fact that plaintiff returned to work *at all* after the accident *would not* indicate there was *no* exacerbation of the injury, *but would be helpful in evaluating the severity of the exacerbation* (239).

The testimony of plaintiff's medical witnesses establishes the fact of injury, exacerbation and permanency thereof, and the inability of plaintiff to pur-

sue his former occupation (135-172). In the light of such evidence, these questions should have been submitted to the jury.

In the *Callen* case, supra, at page 297, the Court said:

> "An examination of the record at the trial makes it clear that *the issue was raised* and sharply litigated *as to whether the injury,* if *received by plaintiff,* in the manner alleged, *was permanent* in character. *Only when* and if *this issue was resolved in favor of one party or the other could it be known whether there was a basis for finding a mutual mistake or any mistake of fact in executing the release. The court,* however, resolved the issue of permanence of injury against the defendant, at least so far as the release was concerned, and on that basis *withdrew consideration of that issue from the jury.*" (Emphasis added.)

Under the ruling of the *Callen* case, the District Court, in directing the verdict for the defendant, took these questions from the jury. This was prejudicial error.

It is well settled that exacerbation or aggravation of a pre-existing condition presents a question of fact for the jury. In *Matthews v. A. T. & S. F.,* 54 Cal. App. (2d) 549, 129 Pac. (2d) 435, the Court states:

> "The question whether the evidence does show with reasonable certainty that plaintiff's future disability will result from the aggravation of his previous condition by his injuries rather than from the previous condition alone *is primarily one for the jury.*" (Emphasis added.)

It follows that the Court erred in not submitting the question of extent, exacerbation and permanency of injury to the jury.

2. The questions whether plaintiff had a mistaken belief as to the permanency of his injury and whether, if so, he entered into the release in question under such mistaken belief should have been submitted to the jury.

The uncontradicted facts disclose that when plaintiff signed the release in question, he thought that he could return to work on passenger service and would be "all right" within thirty to sixty days. In this, he relied upon the representations of Dr. Morrison, chief surgeon of defendant's hospital at Los Angeles, California. He did not know that he had any injury other than those he discussed with this doctor.

The evidence shows that plaintiff suffered an exacerbation of a pre-existing, non-disabling condition, which became permanently disabling as a result of this accident. He knew nothing about this permanent disability when he signed the release in question. Under such circumstances, the jury could well find that the plaintiff signed the release in question under a *mistaken belief* as to the permanency of his injury.

In directing the jury's verdict, the District Court ruled, as a matter of law, that plaintiff did not have a permanent injury and had no mistaken belief in that regard. These were purely questions of fact which should have been submitted to the jury.

The *Callen* case (supra) held that the failure of the District Court to submit to the jury, as a question of fact, the issue of whether or not the plaintiff entered into a release under the mistaken belief as to the permanency of his injury, constituted reversible error. *The District Court, in the case at issue, by directing the jury's verdict, did likewise.* Therefore, this was reversible error.

3. The question whether plaintiff "knew or suspected" that he had a "permanent" or "unknown" injury at the time of signing the release should have been submitted to the jury.

This question is similar to the question discussed in (2) supra. It becomes relevant in a separate and distinct manner by reason of § 1542 of the Civil Code of California which provides as follows:

> "A general release does not extend to claims which the creditor *does not know or suspect to exist in his favor* at the time of executing the release, which if known to him must have materially affected his settlement with the debtor." (Emphasis added.)

This section applies to a personal injury release. (*Backus v. Sessions,* 17 Cal. (2d) 380; 110 Pac. (2d) 51.) The release in question was a *general* one. This section applies to the facts of this case. The plaintiff did not know or suspect, because of Dr. Morrison's representations, that a pre-existing non-disabling condition had been exacerbated by the accident into a permanently disabling one.

Under the cases which have interpreted this code section, it is held that the release is *valid only* as to

KNOWN injuries and has no application in regard to UNKNOWN injuries.

Backus v. Sessions, 17 Cal. (2d) 380; 110 Pac. (2d) 51;

O'Meara v. Haiden, 204 Cal. 354, 268 Pac. 334;

Meyer v. Haas, 126 Cal. 560, 58 Pac. 133;

Matthews v. A. T. & S. F. Ry. Co., 54 Cal. App. (2d) 549, 129 Pac. (2d) 435;

Pac. Greyhound Lines v. Zane (C.C.A. 8th), 160 F. (2d) 736.

Consequently, plaintiff's cause of action, even in the absence of fraud or mistake, would be barred by the release ONLY as to those injuries which he *knew or suspected* to exist. Since the evidence shows that he did not know or suspect his permanent injury, it follows that the release is not a bar to his recovery for such an injury.

South West Pump & Mach. Co. v. Jones (1937), (C.C.A. 8th), 87 F. (2d) 879.

It was error, therefore, to take from the jury the question whether plaintiff "knew or suspected" that he had such an injury at the time he signed the release. In directing the jury's verdict, the District Court ruled as a matter of law that plaintiff knew about his permanent injury when he signed the release. This, again, was a question of fact which should properly have been submitted to the jury.

Jordan v. Guerra, 23 Cal. (2d) 469, 144 Pac. (2d) 349;

Matthews v. A. T. & S. F. Ry. Co., 54 Cal. App. (2d) 549, 129 Pac. (2d) 435;
Cullen v. Penn R. Co., supra.

4. The question of fraud should have been submitted to the jury.

The evidence shows that defendant failed to reveal to plaintiff the real nature and extent of his injuries, although such information was within its possession and power to do so.

Plaintiff was admitted to the Santa Fe Hospital at Los Angeles, California, on August 14, 1945. He was there ten days. X-rays taken by defendant's hospital doctors showed plaintiff to be suffering from a crushed, degenerative vertebral disc between the fifth lumbar vertebra and the sacrum. Plaintiff was not informed by these doctors that he had such an injury, but was discharged from the hospital in a disabled condition. His actual injury, permanently disabling, was concealed from plaintiff. He knew nothing about it. He was given an unqualified release from the hospital.

The evidence further shows that defendant's doctors misrepresented plaintiff's condition to him. On September 19, 1945, plaintiff went to see Dr. C. A. Morrison, chief surgeon in charge of the Santa Fe Hospital at Los Angeles, to discuss his physical condition which, at that time, had not improved since the date of the accident. Dr. Morrison then and there represented to plaintiff:

(a) That plaintiff was *"all right"* and could return to work;

(b) That plaintiff should "start work on passenger service"; and

(c) That plaintiff "would be all right within 30 to 60 days".

Because of these misrepresentations, and the failure to reveal the x-ray findings to him, plaintiff did not know the real nature and extent of his injury. He did not learn of the real nature of his injury until examined by Dr. Fenlon and x-rays showed the same on February 13, 1946. He had no prior knowledge of a pre-existing degenerative disc. Whatever his spinal condition was prior to the accident, it was non-disabling. This condition was exacerbated and caused to become permanently disabling by the crushing resulting from the trauma of the accident.

Relying upon the misrepresentations of Dr. Morrison, plaintiff returned to Needles, California, to settle with the defendant in order to return to work. He negotiated settlement on this basis, and on October 1, 1945 executed the general release in question.

The evidence is uncontradicted that plaintiff did not *KNOW OR SUSPECT* the real nature, extent or permanency of his injury at the time he signed the release.

The evidence shows conclusively that the defendant's doctors did not reveal to plaintiff the findings

of the x-rays taken at the defendant's hospital. Likewise, that Dr. Morrison's representations to plaintiff were untrue; that plaintiff was not able to return to work even on passenger service and certainly was not "all right within 30 to 60 days", and to the contrary, suffered a permanent injury.

The jury could readily infer that the failure to reveal such information as contained in the x-rays and the representations made by the company doctor, were deliberate and fraudulent and that plaintiff relied upon them in signing the release; that such concealment and misrepresentations were made with the intent to defraud plaintiff and to conceal his real injury so that he would settle with defendant company for a modest sum, thereby avoiding payment by defendant of a sum commensurate with plaintiff's real and permanent injury. See:

A. T. & S. F. Ry. Co. v. Peterson, 34 Ariz. 292, 271 Pac. 406;

Matthews v. A. T. & S. F. Ry. Co., 54 Cal. App. (2d) 549, 129 Pac. (2d) 435;

Backus v. Sessions, 17 Cal. (2d) 380, 110 Pac. (2d) 51;

Jordan v. Guerra, 23 Cal. (2d) 469, 144 Pac. (2d) 349;

Meyer v. Haas, 126 Cal. 560, 58 Pac. 133;

Irish v. Central Vt. Ry., 164 F. (2d) 396;

Thompson v. Camp, 153 F. (2d) 396;

Pac. Greyhound Lines v. Zane (C.C.A. 8th), 160 F. (2d) 736.

5. The question of mistake should have been submitted to the jury.

Assuming that defendant acted in good faith in dealing with plaintiff and was not aware of plaintiff's crushed vertebral disc which caused his permanent disability, at the time of execution of the release, the evidence shows that plaintiff, likewise, was not aware of such disability. It follows that there was a mutual mistake as to the existence of a material fact when the release was executed.

This point is fully covered in *Matthews v. A. T. & S. F. Ry. Co.,* 54 Cal. App. (2d) 549, 129 Pac. (2d) 435. The Court states (p. 558):

> "The statement made to plaintiff by defendant's physician, that he had recovered, *was one of fact. It was believed by plaintiff and if it was believed by the physician, the case is one of mutual mistake. If* the statement was *not believed by the physician we have a case of fraud."* (Emphasis added.)

The representations of Dr. Morrison were statements of fact and not merely a mistaken medical opinion as to future developments. Here, Dr. Morrison, told plaintiff that he was "all right" and "could return to work on passenger service" and that he "would be all right within 30 to 60 days". These were statements of material facts as to the seriousness of the injury sustained by plaintiff and his present condition at the time.

Union Pac. R. Co. v. Zimmer, 87 A.C.A. 611, 197 Pac. (2d) 363.

In the *Union Pac. R. Co. v. Zimmer* case (supra) the Court states at page 616:

> "As was said in *Scheer v. Rockne Motors Corp.* (2 Cir.), 68 F. 2d 942, 945 (holding a release voidable for mutual mistake), 'There is indeed no absolute line to be drawn between mistakes as to future, and as to present facts. To tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; *it is an assurance as to his present condition and so understood.*' (See also, Tulsa City Lines v. Mains (10 Cir.), 107 F. 2d 377, 381.)" (Emphasis added.)

In this connection, the rule appears to be well settled that a release for personal injuries is invalid where executed as a result of the attending surgeon's erroneous or false statement of opinion concerning the physical condition of the releasor.

So. West Pump & Mach. Co. v. Jones (C.C.A. 8th), 87 F. (2d) 879;

Steele v. Erie R. Co., 54 F. (2d) 688;

Lion Oil Ref. Co. v. Albritton (C.C.A. 8th), 21 F. (2d) 280;

A. T. & S. F. Ry. Co. v. Peterson, 34 Ariz. 292, 271 Pac. 406;

Thompson v. Camp, 163 F. (2d) 396;

Lumley v. Wabash R. Co., 76 Fed. 66, 67;

Southern Ry. Co. v. Clark, 233 Fed. 900, 904;

Great Northern Ry. Co. v. Fowler, 136 Fed. 118.

In the *Zimmer* case, supra, the Court states at page 617:

"* * * on principle, it would seem *immaterial what the source of the information* giving rise to a mutual mistake *might be.* (Tulsa City Lines v. Mains (2 Cir.), 107 F. 2d 377, 381.)" (Emphasis added.)

The same Court, at page 615, states:

"Each case, of course, *must* be considered on its own facts, *and the question of mutual mistake is normally one for the trier of fact.* (45 Am. Jur., Release, sec. 49, p. 708.)"

See also:

Callen v. Penn. Ry. Co., 68 S. Ct. 296, 332 U. S. 625, 92 L. Ed. 235;

Jordan v. Guerra, 23 Cal. (2d) 469, 144 Pac. (2d) 349;

Matthews v. A. T. & S. F. R. Co., 54 C. A. (2d) 549, 129 P. (2d) 435;

Backus v. Sessions, 17 Cal. (2d) 380, 110 P. (2d) 51;

O'Meara v. Haiden, 204 Cal. 354, 268 Pac. 334;

Wilkerson v. McCarthy, 69 S. Ct. 413, 335 U. S. 807 (cert. granted).

From the foregoing authorities, it is apparent that the District Court erred in failing to submit to the jury the question of mutual mistake.

6. The Court erred in taking from the jury the question whether plaintiff had effectively rescinded the release.

Where fraud is found to exist, rescission is unnecessary. Here, the jury could readily infer defendant's fraud. Once established, fraud vitiates the release and

rescission and restoration of consideration are unnecessary.

Irish v. Cent. Vermont Ry., 164 F. (2d) 396;
A. T. & S. F. v. Peterson, 34 Ariz. 292, 271 P. 406;
Brown v. Penn. R. Co., 158 F. (2d) 795.

Where Section 1542 of the Civil Code of the State of California applies, rescission and tender of consideration are likewise unnecessary for the reason that no consideration has been received for the UNKNOWN injury and therefore nothing need be restored or tendered to the other party. Here, the jury could reasonably have found that plaintiff's injury was UNKNOWN to him at the time he signed the release and therefore the consideration which he had received from the defendant need not be returned because the release was binding as to KNOWN injuries and plaintiff had agreed to said sum as compensation for the KNOWN injuries ONLY. Consequently, rescission and tender of the money received by plaintiff to defendant were unnecessary.

Backus v. Sessions, 17 Cal. (2d) 380, 110 P. (2d) 51;
O'Meara v. Haiden, 204 Cal. 354, 268 P. 334;
Jordan v. Guerra, 23 Cal. (2d) 469, 144 P. (2d) 349.

Only where the invalidity of the release is based upon a mutual mistake of fact is it necessary to rescind. Under the facts herein, the jury could well have found that plaintiff had effectively rescinded the release and that defendant had suffered no prejudice

or damage as a result of any delay in rescinding; and further, that plaintiff's use of the settlement money did not constitute a ratification thereof.

Hind v. Silva (C.C.A. 9th), 75 F. (2d) 174.

7. The question of validity of the release signed by plaintiff should have been submitted to the jury.

The evidence shows that plaintiff executed the release upon the misrepresentations of the defendant's doctor. The evidence also shows a serious and permanently disabling injury to plaintiff's spine. There is no evidence to contradict the permanency of this injury. Under such facts, it was error for the District Court to withdraw the question of validity of the release from the jury.

In the *Callen* case, supra, at page 297, the Supreme Court states:

> "Even if the issue of *permanence* were resolved against the defendant, an issue still existed as to *validity of the release* since the defendant insists that it did not act from mistake as to the nature and extent of the injuries but entered into the release for the small consideration involved because, upon the evidence in its hands at the time, no liability was indicated. *We think the defendant was entitled to argue these contentions to the jury and to have them submitted under proper instructions.*" (Emphasis added.)

In directing the jury's verdict in the case at issue, the District Court not only ruled, as a matter of law, that plaintiff suffered no permanent injury, but also that the release was valid, despite the evidence which

clearly indicates (1) fraud; (2) mutual mistake; or (3) that Section 1542 of the Civil Code of California applies as to plaintiff's UNKNOWN injury. The jury could reasonably have found that the release was invalid on any one or all of the above bases. Therefore, these issues should have been submitted to the jury. It was prejudicial error not to do so.

VII. CONFLICT WITH SUPREME COURT DECISIONS.

Appellant respectfully urges that the judgment of the District Court is directly in conflict with the decisions of the United States Supreme Court in the cases of *Callen v. Penn. R. Co.,* 68 S. Ct. 296, 332 U. S. 625, 92 L. Ed. 235, and *Wilkerson v. McCarthy,* 69 S. Ct. 413, 335 U. S. 807 (cert. granted).

VIII. CONCLUSION.

Appellant prays that this Court instruct the District Court to order a new trial and to submit to a jury the single issue of the extent of plaintiff's damage, or, at least, to submit to a jury the questions of fact set forth herein.

Dated, San Francisco, California,
March 15, 1949.

Respectfully submitted,
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